TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 185

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY AND MARYLAND CASUALTY COMPANY, PETITIONERS,

vs.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THIRD COMPENSATION DISTRICT OF UNITED STATES, AND EMIL BRUNO GUBE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 25, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(35,999)

(35,999)

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, MARCH TERM, 1929

5043

BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY,

vs.

AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States, and EMIL BRUNO GUBE

Louis Wagner, Esq.
G. C. Krewson, Esq.

DOCKET ENTRIES

1929.

May 1. Bill of Complaint filed.
" 1. Subpœna exit—returnable May 21, 1929.
" 16. Subpœna returned—on May 3, served as to each defendant and filed.
" 18. Answer by E. B. Gube filed.
Aug. 17. Petition for leave to file amendment to Bill of Complaint filed.

[fol. 2]

1930.

Apr. 14. Argued.
" 28. Opinion, Dickinson, J., upholding conclusion of Deputy Commissioner filed.
May 6. Petition for re-argument and Decree granting petition filed.
June 6. Re-argument.
" 18. Opinion, Dickinson, J., denying motion for re-argument and granting leave to submit decree in conformity with Opinion filed April 28, 1930, filed.
" 30. Decree dismissing Bill of Complaint with costs filed.

1930.

July 16. Assignments of Error filed.
" 16. Petition for appeal and Decree granting petition filed.
" 16. Bond sur appeal by plaintiff in $250 with Maryland Casualty Company, surety and Decree approving same filed.
" 16. Præcipe as to transcript of record sur appeal.
" 16. Stipulation of counsel digesting pleadings and evidence to be used in place of pleadings, etc. in appeal filed.
" 16. Copy of notice of appeal filed.
" 17. Citation allowed and issued.
" 30. " returned—service accepted & filed.

[fol. 3] IN UNITED STATES DISTRICT COURT, MARCH TERM, 1929.

In Equity. No. 5043

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY, a Corp., and MARYLAND CASUALTY COMPANY, a Corporation,

vs.

AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States, and Emil Bruno Gube

CONDENSED STATEMENT OF PLEADINGS AND EVIDENCE

Stipulation of Counsel Digesting the Pleadings and the Evidence to be Used in the Place of the Pleadings and Record on Appeal from the Decree of the District Court for the Eastern District of Pennsylvania in the Above-entitled Case, to the United States Circuit Court of Appeals for the Third Circuit, and Stating the Questions for Review by the Circuit Court of Appeals—Filed July 16, 1930

George C. Krewson, Esquire, attorney of record for Emil Bruno, defendant appellee, and Louis Wagner, Esquire, [fol. 4] attorney of record for the Baltimore and Philadelphia Steamboat Company, and Maryland Casualty Company, plaintiffs appellants, hereby agree upon the follow-

ing as the facts for the purpose of obtaining a review of the Decree of the United States District Court for the Eastern District of Pennsylvania in the above entitled case:

Claim filed by Emil Bruno Gube, an employee of the Baltimore and Philadelphia Steamboat Company, a corporation, alleging an accidental injury arising out of and in the course of employment on board ship on navigable waters of the United States on February 17, 1928, and causing total disability thereafter until October 11, 1928, and followed by permanent limitation of motion of the left arm and averring occupation as carpenter at $35.94 per week. Answer filed by steamboat company admitting compensible accident and jurisdiction of the Commissioner and timely notice thereof, and admitting the extent of temporary total disability, but denying permanent disability to the extent averred and denying the wages as averred.

After hearing by the Deputy Commissioner, he made his findings and order, a copy of which is attached hereto and the facts recited therein are accepted as true except the finding regarding the average weekly wages and the number of weeks during which compensation should be paid. Regarding this finding in the Deputy Commissioner's opinion, it is admitted that the amount paid by the employer to the employee during the year prior to the accident including overtime, would average $36.06 a week. It is stipulated as a fact that the claimant was employed to work regularly as a carpenter, to work a regular number of hours per days and days per week for the sum of $31.50 per week and that the employee was to be paid for any work beyond his hours [fol. 5] of regular employment at the same rate as he was paid for his hours of regular employment.

Within the time allowed by law, the employer and insurance carrier as plaintiffs, filed a Bill of Complaint in Equity in the United States District Court for the Eastern District of Pennsylvania seeking

(a) to set aside the Deputy Commissioner's finding of average weekly wage of $36.06 and his award of $24.04 based thereon. And to set up in the place thereof the sum of $31.50 as the average weekly wage and $21.00 as the rate of compensation to be based thereon. And

(b) Seeking to set aside the order for the payment of compensation form the space of 146 weeks and setting up in

the place thereof an order for the payment of compensation during the space of 125.6 weeks.

An answer was filed by the defendant, Gube, asserting that the finding of the Deputy Commissioner was correct both

(a) as to the finding regarding the average weekly wage and also

(b) as to the period of time during which compensation should be paid.

Thereafter in due course, the cause came on for hearing before Honorable O. B. Dickinson, Judge, and after the cause was submitted, the Court filed an opinion indicating that the deputy commissioner was correct both as to finding,

(a) of average weekly wage, and

(b) the period during which compensation should be [fol. 6] paid. The opinion of the District Court is attached hereto and is to be taken as a part hereof. Thereafter, the plaintiffs filed a petition for re-argument seeking to further argue the correctness of the deputy commissioner's finding of the period of time during which compensation should be paid, and in due course, after, the plaintiffs filed a petition for re-argument District Court, Honorable O. B. Dickinson, Judge, presiding, filed an opinion re-affirming the belief of the District Court that the deputy commissioner was correct in his finding of the period of time during which compensation should be paid and denied the motion for re-argument. A copy of which opinion is attached hereto as part hereof.

Thereafter, a Decree in conformity with the opinions filed was presented and entered dismissing the plaintiffs' Bill of Complaint.

From the Decree so entered the plaintiffs appealed to the Circuit Court of Appeals for the third circuit and desire to have reviewed the following questions.

First. Where an employee is by contract paid a fixed weekly sum for certain fixed hours of daily, regular employment, and is also paid for any time worked beyond his hours of regular employment, whether the deputy commissioner erred in calculating the average weekly wage.

Second. Where an accident produces temporary total disability which is followed by a permanent partial disability, and the actual healing period is in excess of the statutory healing period, prescribed for the particular injury, whether the period during which compensation is payable for such injury is limited to the number of weeks specified as compensation for such injury by Section 8, [fol. 7] paragraph c of the Longshoremen's Act.

Louis Wagner, Attorney for Plaintiffs, Appellants.
Geo. C. Krewson, Attorney for Defendant, Appellee.

Endorsed

Approved 7/16/30.

(S.) O. B. Dickinson, Trial Judge.

Copy

United States Employees' Compensation Commission,
Third Compensation District

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act

Case No. 29-4

Emil Bruno Gube, Claimant,

vs.

Baltimore and Philadelphia Steamboat Co., Employer;
Maryland Casualty Co., Insurance Carrier

Compensation Order—Award of Compensation

Such investigation in respect to the above entitled claim having been made as is considered necessary and
[fol. 8] A hearing having been duly held in conformity with law.

The Deputy Commissioner makes the following:

Findings of Fact

That on the 17th day of February, 1928, the claimant above named was in the employ of the employer above

named at Camden, in the State of New Jersey in the Third Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman; that in coming down a ladder same slipped, throwing claimant back to the railway below and that the injury consisted of dislocation of the head of the humerus and fracture just below the head of the humerus;

That actual notice of injury was given within thirty days;

That the employer furnished claimant with medical treatment etc., in accordance with Section 7 (a) of the said Act.

That the average weekly wages of claimant in the same occupation for one year prior to the injury were $36.06 and he is entitled to compensation at two-thirds of this amount, $24.04.

That he was totally disabled from February 17th, to October 11, 1928, inclusive, 34 weeks, and has been paid compensation at $21.00 per week for this period amounting to $714.00.

That subsequent to October 11, 1928, compensation was paid at the rate of $4.33 per week to February 21st, 1929, inclusive, amounting to $82.27.

[fol. 9] That permanent partial disability amounting to 40% loss of use of the left arm has resulted from this injury.

Upon the foregoing facts the Deputy Commissioner makes the following

Award

That the employer, the Baltimore and Philadelphia Steamboat Co. and the insurance carrier, the Maryland Casualty Co., shall pay compensation as follows:

At the weekly rate of $24.04 for 146 weeks beginning February 17, 1928, against which they shall have credit for the payments heretofore made, which up to the time of hearing, March 18, 1929, aggregated $796.27.

Given under my hand at Phila., Penna., this 5th day of April, 1929.

Augustus P. Norton, Deputy Commissioner, Third Compensation District.

IN UNITED STATES DISTRICT COURT

OPINION IN RE FINAL DECREE—Filed Apr. 28, 1930

DICKINSON, J.:

This case arises under the Act of Congress extending the principle of injured workmen's compensation to those in longshoremen's employment. These laws have two main objectives. One is to provide a prompt, speedy, simple and [fol. 10] inexpensive method of adjusting compensation; the other to preserve to every one affected by the award made all his legal rights. To reach the first objective in the practical working of the system reliance is placed upon the Deputy Commissioner; to achieve the second recourse is given to the Courts. The Deputy Commissioner has computed the compensation period in the instant case at 146 weeks, and the wage earning capacity of the injured workman at $36.06. The plaintiff complains of the former as longer than the law prescribes and the latter as in fact too high.

The experienced counsel for the plaintiff, whose familiarity with this legislation has given him a firm grasp of the whole subject, has made an analysis of the Act of Congress, which we adopt and follow. The measure of compensation has the dual basis of injury to the workman and his wage earning capacity. The injury is translated into terms of disability. The disability is measured by its extent and duration. We thus have disabilities which are total or partial, permanent or temporary. A third feature is likewise recognized by the Act. Every injury, whatever its extent, requires what is called "a healing time". During this period the disability is total. We thus have in terms of disability five classes of injuries. They are (1) total, (2) partial, (3) permanent, (4) temporary and (5) total for a time and partial thereafter. Injuries of course vary in their nature, extent, duration and required "healing time". The law seeks as best it can to measure compensation by the severity of the injury viewed as a disability by classifying injuries, fixing compensation periods and a healing time, and graduating allowances by fixed percentages. The disability in the instant case was total during the healing time and partial thereafter and is permanent. The scheduled

[fol. 11] compensation time applicable is 312 weeks; the percentage 40 per cent. and the allowed healing time 32 weeks. The actual healing time of course varies with the nature and extent of the injury. The law recognizes this by providing for cases in which the actual healing time exceeds the schedule time by extending the compensation time accordingly. The actual healing time here was 34 weeks, and the excess thus 2 weeks. The elements in the compensation computation thus became as figured by the Commissioner (1) actual healing time 34 weeks; (2) allowed compensation time 314 weeks; (4)) total disability period 34 weeks; (5) remaining partial disability period 280 weeks, and (6) percentage 40 per cent. He accordingly figures the compensation period at 146 weeks as follows:

1. Schedule healing period	32 weeks	
Excess of actual period	2 "	
Actual healing and total disability time		34 weeks
2. Schedule compensation time	312	
Excess allowed	2	
Total compensation time	314	
Less disability time as above	34	
Partial disability time	280	
40% allowed compensation time		112 weeks
Total compensation time		146 weeks

[fol. 12] The plaintiff figures thus:

Schedule compensation time	312 weeks	
Excess allowed	2 "	
40 per cent. of total	314	125.6 weeks

It will be observed that the difference in these computations is that the Commissioner has allowed for total disability as long as it lasted and for permanent partial disability for the remainder of the compensation, while the plaintiff allows only for permanent partial disability but allows it for the whole compensation period.

For the soundness of the construction of the Act of Congress upon which the 125.6 weeks computation is based, the plaintiff relies upon Texas vs. Sheppard, 32 (2nd) Fed. Rep., 300; a regulation of the Commission which followed the ruling and a number of rulings of the New York State Courts construing a New York Statute of like verbiage with the Act of Congress.

We are quite in accord with counsel for defendants that the rights of the injured employee under the Act of Congress are as the United States Statute, as construed by the Courts of the United States, defines them, and that neither the Commission nor the Courts of New York nor both can dictate the meaning of the Statute. This, however, is not the thought conveyed in the opinion of Judge Hutcheson. If a phrase, through judicial interpretation, has come to have a definite fixed meaning when it is bodily incorporated into a Statute, it will be given that meaning in the Statute which it was before interpreted to have. This means no more than that the Legislature has used the phrase in its accepted sense. This is in line with the well [fol. 13] known rule of construction commonly resorted to in cases in which a phrase used in one Act has been judicially interpreted and subsequently incorporated in another Act. It goes no further, however, than that the Courts seek to find the real meaning of the Statute by calling to their aid this as they do other canons of construction, such as that the Courts in construing a Statute may look for light to an executive or administrative construction given it or to the rulings of Courts which have construed like laws. Such interpretations may well be received as persuasive, although not authoritative, otherwise than upon the stare decisis principle. Here we have an interpretation of the law by a Court of the United States adopted and followed by an executive construction and a corresponding change of administrative rulings. It has, because of this, doubly persuasive force and should be followed if it can be accepted.

In the well considered brief of the experienced counsel for the plaintiff the gist of the ruling cited is stated to be that the workman who has sustained temporary total disability and permanent partial disability may claim either temporary total disability for the time it existed or may claim partial disability for the statutory time but cannot claim both when they both resulted from the same injury. This is likewise the meaning given to the ruling in the regulations which followed it. With due deference to the Court which so ruled, we are unable to so read the Act. Its meaning, as we read it, is to give compensation measured, it is true, as the Act prescribed, but to give compensation for temporary total disability, so far as there was total dis-

ability, and for permanent partial disability, so far as it is present up to the percentage allowance. Where the disability is total for a time and partial for the rest of the [fol. 14] time, we cannot read it as requiring the workman to call it one or the other and have his compensation measured accordingly. It is true, of course, that a permanent partial disability began when the injury was sustained and hence runs through the whole compensation period, and in this view it is logical to say that a claim for permanent partial disability is a claim for the whole compensation time from the receipt of the injury. This, however, is not strictly accurate, or at least there is as much truth in saying that during the healing period there was no partial disability but a total disability, and that the partial disability did not begin until the total disability was ended.

The plaintiff recoils from the logical consequences of this view and views the facts as if there had been only a partial disability from the injury and ignores the total disability period altogether, except only that its excess over the statutory healing period lengthens the compensation period.

We cannot see it in any other light than that Congress meant to allow compensation based upon the injuries sustained when disability results both with respect to its extent in what is called its "character" and its duration in what is called its "quality" sense. Exception might perhaps be taken to these quoted words as not very happily chosen but the sense in which they are employed seems clear. The truth is that there are two injuries sustained when expressed in terms of disability—one a temporary total disability and the other a permanent partial disability, and on the principle that the greater includes the less and indeed by the very terms partial and total the partial disability does not exist as long as the total disability lasts. A healing period is a total disability period. Irrespective [fol. 15] of the fact it is assumed to be 32 weeks, and the extension of it beyond the statutory period is made by the Statute to extend the partial disability compensation period. Any argument drawn from this that Congress thereby meant to ignore the total disability period, whenever there was a claim for partial disability, is answered by the thought that if Congress had meant this it would have been easy to have said so. The Act does not in terms

so say, and the meaning of what it does say is, as we read it, that the disability shall, as before stated, be figured in the computation as total as long as it is total and as partial for the remainder of the compensation period. It will be noticed that this means that under the operation of the extension of the compensation period provision, the compensation time upon which the partial disability percentage is figured always is the same (here 280 weeks) no matter what the duration of the total disability. This means that a partially disabled workman shall always receive the partial disability allowance, but when he has suffered in addition a temporary total disability, he shall be allowed additional compensation through having the compensation period correspondingly extended. We think this to be precisely what Congress intended, but we are not persuaded that it was thereby meant he should forego the total disability allowance. The vice, as we view it, of the other construction is that it does not allow for the full time of the duration of the total disability but for only a part (here 40%) of it. We find in the Act no warrant for this curtailment.

The conclusion reached is that the Deputy Commissioner was right in his finding of the time basis upon which compensation is to be figured.

Respecting the finding of the wage basis upon which [fol. 16] compensation is computed, very little need be said. So far as it is a mere fact finding, it should not be disturbed, except for reasons which are here absent. The only law in the question is whether the Commissioner properly construed the Act of Congress. We think he did. Congress clearly meant that the wage basis of the compensation should be the real wage earnings, not only that part of them which is expressed in terms of money. A workman whose wages are a given sum of money for an eight hour day with an hourly wage for overtime, if he works overtime "makes" not the stipulated daily wage but what is paid him for the work he does. What is the daily wage as thus defined is a question of fact. This fact it is the province of the Commissioner to find, and the finding made is accepted as one in accordance with law. Aside from this the figures which express his finding are not only supported by the facts but the facts would have warranted the finding of even a larger sum.

An appropriate decree in acordance with this opinion may be submitted.

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION FOR REARGUMENT—Filed June 18, 1930

DICKINSON, J.:

The very fair and well considered argument addressed to us on behalf of the plaintiff of itself commands a re-discussion of the whole case. There is agreement all around that except for the ruling in what has come to be called the Texas case, this Bill for review should not prevail as the plaintiff [fol. 17] here could not complain of the ruling of the Commissioner. The pivot point of the ruling in the Texas case, as we read the opinion, is the proposition that a workman may claim for temporary total disability or he may claim for permanent partial disability but he cannot receive both. If that proposition is withdrawn, the reasoning of the opinion is without other support than the other proposition that the rulings of the New York Courts must be read into the Act of Congress.

Counsel for the plaintiff here does not accept the proposition that the workman is driven to an election and so reads the opinion in the Texas case that the Court there did not mean this by the quoted phrase that the workman may claim "either temporary total or permanent partial disability as suits him best but cannot claim both."

We are unable to follow counsel in reading this thought out of the opinion, but, on the contrary, read it to be the point which supplies the fulcrum which gives force to the logic of the opinion. The quoted proposition is what we have called the pivot point of the ruling made. If it is accepted, the reasoning of the opinion and the conclusion reached must be accepted. By the same token, if this proposition be rejected, the reasoning of the opinion is without force.

The Act of Congress, as we analyze it, provides for at least ten different fact situations. Those which concern the instant case are:

1. A temporary total disability.

2. A permanent partial disability.

3. A temporary total disability of 35 weeks, which exceeds the allowed healing period, which is 32 weeks.

[fol. 18] 1. An injured workman is given compensation for total disability (measured by two-thirds of his weekly wage) "during the continuance thereof".

Section 8, clause "b" of the Act.

2. He is given compensation for permanent partial disability for 312 weeks, measured by a like percentage of his wage.

3. As he has suffered from both a temporary total disability and a permanent partial disability, the compensation is increased by lengthening the time of compensation from 312 to 315 weeks.

Section 8, clause "c", sub-section 22.

Three observations may be here made. One is that there is not a word of suggestion anywhere in the Act that this compensation be cut down for any reason. Another is that the total disability compensation is to continue as long as the disability lasts and then cease but the partial disability compensation is for a time fixed by the Act. A third is that the Act when thus construed provides an easily working programme but difficulties are introduced under any other construction because the workman cannot know the duration of a total disability until it ends.

We have said there is not a word of suggestion of the curtailment of the compensation in fact situations such as that here presented. It is only by going outside of this case to another which a different fact situation presents, that we have a suggestion of the thought of a cutting down.

The final provision in sub-division 22 of clause c of Section 8 is that in cases of certain injuries (which include the type of injury here) the compensation shall be limited to [fol. 19] the time allowed by the Act for permanent partial disability. This is the provision upon which plaintiff relies. It is clear, however, that this provision has no application to the present case as it is restricted to a wholly different class of cases, to wit, those in which the total dis-

ability existed for a short time only. We see no force in the argument which is always made whenever a time limit is fixed on anything. Here it is presented in the question why did Congress allow for temporary total disability and also for an increased compensation for permanent partial disability in the case of one whose total disability lasted for longer than 32 weeks and limit compensation to the partial disability allowance when the total disability lasted only for less than 32 weeks? We can see very good reasons for Congress making a difference between cases in which the total disability period is extended and those in which it is transient. Whenever, however, any line is drawn, the difference in the situation of one who is just over the line and another who is just short of it is never very great.

The motion for a re-argument is denied and a decree in conformity to the opinion before filed may be submitted.

IN UNITED STATES DISTRICT COURT

DECREE—Filed June 30, 1930

Before Dickinson, J.

And now, to wit, this 30th day of June A. D. 1930, it appearing to the Court that the above case came on to be heard in due course on pleadings and proofs and arguments of counsel, and the cause having been duly submitted, and upon due consideration,

[fol. 20] It is ordered, adjudged and decreed that the Bill of Complaint in the above entitled cause be and the same is hereby dismissed with costs.

By the Court.

Attest:

George Brodbeck, Clerk.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS—Filed July 16, 1930

To the Honorable the Judges of said Court:

The petition of the plaintiffs respectfully represents as follows:

1. The plaintiff, Baltimore and Philadelphia Steamboat Company, is a corporation duly authorized to transact business in the Commonwealth of Pennsylvania.

2. The plaintiff, Maryland Casualty Company, is a corporation organized under the laws of the State of Maryland, and duly licensed to transact business in the Commonwealth of Pennsylvania.

3. The defendant, Augustus P. Norton, is Deputy Commissioner for the third compensation district of the United States. And the defendant Emil Bruno Gube was an employee of the Baltimore and Philadelphia Steamboat Company, a corporation.

4. The plaintiffs herein were defendants in proceedings [fol. 21] before Deputy Commissioner Norton in a claim for compensation made against them by Emil Bruno Gube, who was an employee of the plaintiff steamboat company.

5. That said Gube filed a claim with the defendant, Norton for compensation for injuries due to an accidental injury arising out of and in the course of the employment and that after hearing was held, said Norton on April 5, 1929, made certain findings of fact to the effect that said Gube was injured on February 17, 1928, and disabled to October 11, 1928, a period of thirty-four weeks and that his average weekly wages were $36.06 and that he was entitled to compensation at two-thirds thereof, or $24.04 a week and that claimant's injury resulted in a permanent partial impairment of the use of the left arm, amounting to 40% thereof and ordered the defendants to pay the claimant the sum of $24.04 a week for one hundred and forty-six weeks, beginning February 17, 1928, and crediting the defendants with payments aggregating $796.27.

6. Thereafter within the time allowed by law, the plaintiffs filed a Bill of Complaint to review the findings and order of said Norton as not being in accordance with law and seeking to have the enforcement thereof enjoined and set aside insofar as they were not in accordance with law.

7. That an answer was filed to said Bill of Complaint by the defendant Gube but no answer was filed by the defendant, Norton.

8. That thereafter the cause came on for hearing before the District Court for the Eastern District of Pennsyl-
[fol. 22] vania and said Court through Dickinson, Judge, filed an opinion indicating that the Court would enter a Decree dismissing the Bill.

9. Thereafter a petition for re-argument was filed by the plaintiffs and upon consideration of the same, the District Court for the Eastern District of Pennsylvania, through Dickinson, Judge, filed an opinion indicating that the re-argument would not be allowed and that a Decree dismissing the Bill would be entered.

10. That thereafter in conformity with the opinion of the District Court, a Decree dismissing the Bill was entered.

11. The above named plaintiffs conceiving themselves aggrieved by the refusal of the District Court to grant the relief prayed for, and by the entry of the Decree dismissing the Bill, made and entered on the 30th day of June, 1930, do hereby appeal from said Order and Decree to the United States Circuit Court of Appeals for the third circuit for the reasons specified in the assignments of error attached hereto and filed herewith and pray that the appeal may be allowed and that a transcription of the record proceedings and papers upon which said Order and Decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the third circuit.

Louis Wagner, Attorney for Petitioner.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Before Dickinson, Judge

The foregoing claim of appeal is allowed. Bond for costs in the sum of $250.00 to be entered.

By the Court.

Attest:

Leo A. Lilly, Deputy Clerk.

Dated July 16, 1930.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR TO THE ENTRY OF A DECREE DISMISSING BILL OF COMPLAINT—Filed July 16, 1930

And now, to wit, this — day of July, 1930, comes the above mentioned plaintiffs, Baltimore and Philadelphia Steamboat Company and Maryland Casualty Company, both corporations, and say that the order or decree made and entered herein on the 30th day of June, 1930, dismissing the Bill of Complaint, and refusing to grant the relief prayed for in the Bill of Complaint is erroneous and against the just right of such complainants for the following reasons:

1. The District Court erred in refusing to enter a Decree granting the plaintiffs the relief prayed for.

2. The District Court erred in entering a Decree dismissing the plaintiffs' Bill as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, MARCH TERM, 1929

No. 5043

BALTIMORE AND PHILADELPHIA STEAMBOAT COMPANY, a Corporation, et al.,

vs.

AUGUSTUS P. NORTON et al.

[fol. 24] Decree

Before Dickinson, J.

And Now, to wit this 30th day of June A. D. 1930, it appearing to the Court that the above case came on to be heard in due course on pleadings and proofs and arguments of counsel, and the cause having been duly submitted, and upon due consideration,

It is Ordered, Adjudged and Decreed that the Bill of Complaint in the above entitled cause be and the same is hereby dismissed with costs.

By the Court:

—— ——, J."

Attest: George Brodbeck, Clerk.

3. The District Court erred in ruling that money earned by an employee for overtime work was properly considered by the Deputy Commissioner in calculating the average weekly wage. The opinion of the Court being as follows:

"Congress clearly meant that the wage basis of the compensation should be the real wage earnings, not only that part of them which is expressed in terms of money. A workman whose wages are a given sum of money for an eight hour day with an hourly wage for overtime, if he works overtime 'makes' not the stipulated daily wage but what is paid him for the work he does. What is the daily wage as thus defined is a question of fact. This fact it is the province of the Commissioner to find, and the finding made is accepted as one in accordance with law. Aside from this the figures which express his findings are not only supported by the facts but the facts would have warranted the finding of even a larger sum."

[fol. 25] 4. The undisputed testimony shows that the defendant, Gube, worked under an express contract for a stipulated sum of money. And the deputy commissioner notwithstanding the express contractual wage calculated an average wage. And the District Court erred in failing to set aside the calculation of the average wage and in not recognizing the contractual wage as the basis for compensation. The District Court erred in holding as follows:

"The only law in the question is whether the Commissioner properly construed the Act of Congress. We think he did. Congress clearly meant that the wage basis of the compensation should be the real wage earnings, not only that part of them which is expressed in terms of money. A workman whose wages are a given sum of money for an eight hour day with an hourly wage for overtime, if he works overtime 'makes' not the stipulated daily wage but what is paid him for the work he does."

5. The injury to the defendant, Gube, produced a temporary total disability and was followed by a permanent partial disability, and the District Court erred in not limiting compensation and in holding as follows:

"The final provision in sub-division 22 of clause 'c' of Section 8 is that in cases of certain injuries (which include

the type of injury here) the compensation shall be limited to the time allowed by the Act for permanent partial disability. This is the provision upon which plaintiff relies. It is clear, however, that this provision has no application to the present case as it is restricted to a wholly different class of cases, to wit, those in which the total disability existed for a short time only."

Louis Wagner, Attorney for Plaintiffs.

[fol. 26] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 16, 1930

To the Clerk:

In making up the transcript of record sur appeal in the above case record the following papers:

1. Docket Entries.
2. Stipulation of Counsel containing digest of pleadings and evidence, and agreeing that such digest be accepted in the place of the pleadings and evidence in conjunction with the finding of the Deputy Commissioner and the Opinions of the District Court, as the facts for review by the Circuit Court of Appeals.
3. Petition for Appeal.
4. Order allowing appeal.
5. Assignments of Error.
6. This Stipulation.
7. Certificate of Clerk.

Louis Wagner, Attorney for Plaintiff. Geo. C. Krewson, Attorney for Defendant.

[fol. 27] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 28] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1930

No. 4457 (List No. 66)

Balto. & Phila. Steamboat Co. et al., Appellants,

vs.

A. P. Norton, Dep. Comm'r, and Emil Bruno Gube, Appellee-

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Order Assigning Judge—Filed Nov. 12, 1930

And now, to-wit this 12th day of November, A. D. 1930, it is ordered that Hon. J. Whitaker Thompson, District Judge, for the Eastern District of Pennsylvania, be, and he is hereby assigned to sit in above case in order to make a full court.

Joseph Buffington, Circuit Judge.

[File endorsement omitted.]

[fol. 29] Minute entry of argument and submission, November 12, 1930, omitted in printing.

[fol. 30] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Plaintiff's (Appellants') Calculation of Proper Award—Filed Nov. 15, 1930

The defendant Gube has a permanent injury to his arm and his loss amounts to 40% thereof.

Allowed by Section 8 (c) (1) for the loss of an arm ..... 312 weeks

Defendant, Gube's actual disability	34 weeks	
Statutory healing period allowed by Section 8 (c) (22) and included in the 312 weeks allowed by 8 (c) (21)	32 weeks	
Actual healing in excess of statutory healing period	2 weeks	
Excess of actual healing period above statutory healing period allowed by Section 8 (c) (22), to be added to the allowance under 8 (c) (1)		2 weeks
Total		314 weeks

Maximum allowance to injured employee under 8 (c) (1) plus excess of actual healing above statutory healing allowed by Section 8 (c) (22) for the loss of the whole arm	314 weeks
Allowance to the defendant employee under 8 (c) (19) for proportional loss of use, or 40% of 314 weeks	125.6 "

[fol. 31] Actual weekly wage of the defendant employee under his contract of hire	$31.50
Rate of Compensation under 8 (c), two-thirds [redacted] $31.50 or	21.00
Amount of defendant Gube's award in money is 125.6 times $21.00 or	2,637.6

Note

If employee's contention that his claim is not limited by Section 8 (c), under what section of the Act is the subtraction of 34 weeks justified before calculating the percentage of loss. If employee's contention is correct, he should receive the 34 weeks actual disability plus 40% of 314 weeks.

Respectfully submitted.

Louis Wagner, Attorney for Plaintiff, Appellant.

Copy sent Geo. C. Krewson, Esq.

[File endorsement omitted.]

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

CALCULATION OF AWARD OF COMPENSATION TO APPELLEE GUBE AS FOUND BY THE DEPUTY COMMISSIONER AND CONFIRMED BY THE UNITED STATES DISTRICT COURT—Filed Nov. 19, 1930

The Appellee, Gube, sustained a temporary total disability of 34 weeks and a permanent partial disability as to 40% loss use of arm.

To allowance by Section 8 (b) for temporary total disability		34 weeks
To allowance by Section 8 (c) (1) for loss of arm	312 weeks	
Add excess of healing period allowed by Section 8 (c) (22)	2 "	
Total compensation time	314 "	
Less temporary total disability period	34 "	
	280 "	
40% of 280 weeks as per Section 8 (c) (19) for proportionate loss of use of arm		112 "
Total		146 "
[fol. 33] Average weekly wage earning capacity		$36.06
Rate of compensation under 8 (b) and (c) at two-thirds of $36.06		24.04
Total amount of compensation for 146 weeks at $24.04		3,509.84

In reply to Appellants' note appended to their Calculation of Award it is submitted that under Section 8 (c) (22) it would seem to be the intention of Congress as to this part of the Act that the normal healing period should run concurrently with that provided for permanent partial disability but any excess over the former should be added to the latter and then the actual healing period deducted from

the total of the two periods. By this method of computation effect is given to both (b) and (c) of Section 8.

Respectfully submitted.

Geo. C. Krewson, Attorney for Appellees.

[File endorsement omitted.]

[fol. 34] In United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Order for Reargument—Filed Dec. 1, 1930

And now, to-wit, December 1, 1930, after due consideration,

It is ordered that a reargument be had during the week of December 8th in the above entitled case, not to exceed a half hour on each side.

Philadelphia, ——— —, ———.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

[fol. 35] Minute entry of reargument and submission, December 11, 1930, omitted in printing.

[fol. 36] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1930

No. 4457

BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY, Appellants,

v.

AUGUSTUS P. NORTON, Deputy Commissioner for the Third Compensation District of the United States, and Emil Bruno Gube, Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Before Buffington and Woolley, Circuit Judges, and Thompson, District Judge

OPINION—Filed March 25, 1931

WOOLLEY, Circuit Judge:

Emil Bruno Gube, an employee of the Baltimore & Philadelphia Steamboat Company, on descending from a boat of this company, then in navigable waters of the United States, fell and sustained an injury to his left arm. He instituted proceedings against his employer for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Approved March 4, 1927. 44 Stat. 1424; 33 U. S. C. A. Sec. 901-950. The Maryland Casualty [fol. 37] Company was joined as insurance carrier for the Steamboat Company.

At a hearing before the Deputy Commissioner for the proper Compensation District it appeared that the claimant was totally disabled for a period of thirty-four weeks and that, thereafter, he was permanently disabled by a partial loss of use of his arm, estimated at 40 per cent. It also appeared that his regular weekly wages were $31.50 and his average weekly wages including wages for overtime were $36.06. On the Deputy Commissioner's award of compensation for 146 weeks at the weekly rate of $24.04, being two-thirds of the average weekly wages, the Steam-

boat Company and Casualty Company filed a bill for review in the District Court of the United States averring that the Deputy Commissioner should not have included the claimant's overtime earnings in the wage factor of compensation and that instead of the claimant being entitled to 146 weeks' compensation, he was entitled to compensation for only 125.6 weeks. The District Court sustained the findings and award of the Deputy Commissioner both in respect to the amount of weekly compensation and the period of payment. 40 Fed. (2d) 530. The Steamboat Company and the Casualty Company join in this appeal. Three questions are involved: two raised by the appellants and one arising out of an inquiry of our own as to whether the questions are moot in view of the fact that the Steamboat Company, the employer, has paid its injured employee the compensation awarded.

Of course if the questions in this case were moot we should not decide them. If moot as to one party, we think they are not as to the other. True, the Baltimore & Philadelphia Steamboat Company paid its employee the compensation awarded, as it was bound to do, without awaiting an appeal. (Section 921.) If the Steamboat Com-
[fol. 38] pany were the only party to the action the question might, conceivably, be moot. But there are two parties; the Steamboat Company, the principal, and the Maryland Casualty Company, the assurer on the obligation to the employee. The Casualty Company is a real party here. It still desires and has a right to demand that the question of proper payment as affecting its liability to its principal be decided. If the Steamboat Company unwisely or improvidently paid a compensation claim which in law it was not required to pay, that is not a reason why the Surety Company should pay the Steamboat Company and, similarly, that is not a reason why the Surety Company should not have the question tried out and decided so as to fix its legal liability. We hold the questions are properly here for review; and they are two, both dealing with compensation, one reckoned in dollars and the other in weeks.

The first is whether in estimating the compensation to be paid weekly to the injured employee his weekly wages ($31.50) under a contract as to days and hours should control, or the amount of actual wages earned and paid ($36.06) which include not only his weekly wages but also

wages earned outside the time of the contract. Stated differently, the question is whether the compensation should be based on regular weekly wages fixed by contract of employment or on actual weekly wages earned for a period long enough to determine an average. As the statute accords the injured employee compensation for wages lost, we think the compensation should conform to actual wages which, but for the accident, he would have earned. And so, evidently, thought the learned district judge, whose finding in this regard is affirmed.

The next question calls for an interpretation of the vital part of the Longshoremen's and Harbor Workers' Compensation Act because it is the money part of the Act. The [fol. 39] purpose of this Act, as its title denotes, is to provide compensation to an injured longshoreman for his "disability", or incapacity occasioned by an injury, to earn the wages he had ben receiving. (Section 2, paragraph 10 of the Act.) The provision of the Act pertinent to this case is Section 8 (U. S. C. A. Title 33, Sec. 908) which provides a method of computing such compensation to employees who have suffered injuries of different kinds resulting in disabilities of different characters and different qualities. First stating these differences in injuries and in their characters and qualities, the statute then deals with an employee's compensation (in dollars) for lost wages reckoned by weeks. As the statute speaks in figures rather than in words, we find it difficult to construe its terms in the abstract and feel compelled to follow its own structure and devote our interpretation more to figures than to words, believing that out of the figures which the Congress used and out of the order in which it used them its intent will stand out clearly and, we think, with certainty.

Section 8 provides compensation for different degrees of disability:

(a) Permanent total disability;
(b) Temporary total disability;
(c) Permanent partial disability; and
(d) Temporary partial disability.

We are not concerned in this case either on the facts or in interpreting the law with (a) Permanent total disability or (d) Temporary partial disability. The claim-

ant was totally disabled for a time and partially disabled for all time. Therefore we are concerned only with (b) and (c), Temporary total disability and Permanent partial disability, for it is manifest that these two things can [fol. 40] happen, as they did in this case, to one individual as a result of the same accident.

Sub-section (b) of Section 8, dealing with temporary total disability alone, provides that:

"In case of disability total in character (which means that the man is wholly incapacitated to earn a wage) but temporary in quality (which means that though total for a time, the disability may later become partial or disappear altogether) 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance thereof."

But a man may suffer a permanent partial disability without suffering a temporary total disability. In that event sub-section (c) of Section 8 provides:

"In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member (in this case an arm) may be for proportionate loss or loss of use of the member." (In this case found to be 40 per centum.)

Yet a man may suffer both a temporary total disability, which is sometimes referred to as the healing period, and a permanent partial disability as in this case. On that combined event paragraph 22, sub-section (c) of Section 8 provides that:

"In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation

provided in subdivision (c) of this section: Arm, thirty-two weeks; * * *"

"The compensation provided by subdivision (c)" for permanent partial disability to an arm is, as we have seen, [fol. 41] 312 weeks. The excess of temporary total disability over the thirty-two weeks provided by paragraph 22 of sub-section (c) is in this case two weeks, making thirty-four weeks of temporary total disability. As only the "excess" of thirty-two weeks is to be "added" to the 312 weeks, it is clear that the thirty-two weeks healing period is included in the 312 weeks compensation period for loss of an arm or of its use. Adding the excess of total disability (two weeks) to the latter period, the figures in this case stand as follows: 312 weeks plus 2 weeks equal 314 weeks. This figure of 314 weeks now includes disability of both kinds. Compensation for each measured in weeks must be separated in this total because the law deals with them differently. The thirty-four weeks for temporary total disability must be picked out and set aside. To determine the period of payment for permanent partial disability the thirty-four weeks of temporary total disability must be deducted from the total of 314 weeks. This leaves 280 weeks compensation for permanent partial disability. This is for the reason that temporary total disability stands alone; the disability being total, compensation is allowed for it, without deduction or apportionment (Section (b)), to the full two-thirds of the man's weekly wages. But compensation for the remainder of the term (280 weeks), which represents the weeks following temporary total disability and constitutes all the period of permanent partial disability for which compensation is allowed, is subject to apportionment of loss provided by paragraph 19 of sub-section (c) which has in this case been determined to be 40 per cent. of the use of the arm. Now it is just here that, for the first time, apportionment of loss enters into the calculation, and it enters, as it must, at the place in the calculation where sub-section (c) (19) puts it, namely: under the heading of "permanent partial disability" (280 weeks). [fol. 42] Thus there are two separate and distinct figures in the calculation, each a resultant of different sub-sections of Section 8 in question. One, under sub-sections (b) and (c), (temporary total disability), is thirty-four weeks, on which the claimant gets all the law allows without deduc-

tion or apportionment, and the other under sub-section (c), (permanent partial disability), where he gets only 40 per cent. of what the law allows if the disability were total, whether temporary or permanent.

If this method of computation were not pursued but that of the appellants followed, namely; adding the two weeks excess healing period (c-22) to the total 312 weeks (c-1), and then apportioning the sum of these items, there would be an apportionment of 40 per cent. on the thirty-four weeks of temporary total disability with respect to which the statute requires no apportionment.

This would defeat the intent of the Congress to allow full compensation when the disability is total and for "the continuance thereof". The practical or money difference in the two theories of calculation is the difference between 146 weeks and 125.6 weeks and is more clearly disclosed by the following tables:

We figure thus:

Allowance by Section 8 (b) and C-22 for temporary total disability			34 weeks
Allowance by Section 8 (c) (1) for loss of arm	312	weeks	
Add excess of healing period allowed by Section 8 (c) (22)	2	"	
Total compensation time	314	"	
[fol. 43] Less temporary total disability period	34	weeks	
Permanent partial disability period	280	"	
40% of 280 weeks as per Section 8 (c) (19) for proportionate loss of use of arm			112 weeks
Total			146 weeks

The appellants figure thus:

Schedule compensation time, Section 8 (c) (1)	312	weeks	
Excess allowed by Section 8 (c) (22)	2	"	
40% of total	314	"	125.6 weeks

The appellants interpret the statute, and, indeed, some authorities interpret a similar state statute, on the theory that although a man may suffer two kinds of injury from the same accident, he cannot claim compensation for both temporary total disability and permanent partial disability, but most elect the compensation payable for one or the other as suits him best. As we read the statute we see in it the plain intent of the Congress to provide compensation for five situations, four occurring with single disabilities as in (a); (b), (c) and (d), and the fifth, (C-22), where temporary total disability and permanent partial disability occur jointly when both result from the same injury. Following that intent, it is clear that, two kinds of disabilities having been suffered, the compensation applicable to each should be paid so long as, within the statute's limitations, disabilities of these two characters continue respectively; and it is equally clear that as the statute distinguishes between the character of the disabilities and the time of their duration, the compensation should conform to each re- [fol. 44] spectively; and that where, as in temporary total disability, the statute provides no deduction or apportionment, none should be made, and in the other (permanent partial disability) where it provides an apportionment, one should be made yet only for the period of weeks to which compensation for disability of that "character" relates.

Another sentence in paragraph 22 of sub-section (c) which it is thought has a bearing on the interpretation of the statute is the following:

"In any case resulting in loss or partial loss of use of arm * * * where the temporary total disability does not extend beyond the period above mentioned (32 weeks) for such injury, compensation shall be limited to the schedule contained in subdivision (c)."

This provision, it would seem, was inserted to meet a situation not covered by the previous paragraphs and subsections. However that may be, the temporary total disability in this case did extend beyond the period (32 weeks) previously provided and, accordingly, the quoted paragraph has no bearing on the matter in hand.

The decree of the District Court dismissing the bill is affirmed.

A true Copy.
Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 45] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1930

No. 4457 (List No. 66)

Baltimore & Philadelphia Steamboat Co. et al., Appellants,

vs.

A. P. Norton, Dep. Comm'r, and Emil Bruno Gube, Appellees

Decree—Filed Mar. 25, 1931

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed, with costs.

Philadelphia, March 25, 1931.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] Supreme Court of the United States

Order Allowing Certiorari—Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,999. U. S. Circuit Court of Appeals, Third Circuit. Term No. 185. Baltimore and Philadelphia Steamboat Company and Maryland Casualty Company, petitioners, vs. Augustus P. Norton, Deputy Commissioner for Third Compensation District of United States, and Emil Bruno Gube. Petition for a writ of certiorari and exhibit thereto. Filed June 25, 1931. File No. 35,999.